WORKERS COMPENSATION COMMISSION

Amended STATEMENT OF REASONS FOR DECISION OF THE APPEAL PANEL IN RELATION TO A MEDICAL DISPUTE

Matter Number:	**M1-181/20**
Appellant:	**T & F (Personnel) Pty Ltd**
Respondent:	**Clarke Crabtree**
Date of Decision:	**22 June 2020**
Date of Amendment:	**23 June 2020**
Citation:	**[2020] NSWWCCMA 111**

Appeal Panel:	
Arbitrator:	**Ross Bell**
Approved Medical Specialist:	**Dr Richard Crane**
Approved Medical Specialist:	**Dr John Garvey**

This decision is of a majority of the Panel

BACKGROUND TO THE APPLICATION TO APPEAL

1. On 9 April 2020, T & F (Personnel) Pty Ltd, the appellant, lodged an Application to Appeal Against the Decision of Approved Medical Specialist. The medical dispute was assessed by Dr Philippa Harvey-Sutton, an Approved Medical Specialist (AMS), who issued a Medical Assessment Certificate (MAC) on 12 March 2020.

2. The appellant relies on the following grounds of appeal under s 327(3) of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act):

    - the assessment was made on the basis of incorrect criteria
    - the MAC contains a demonstrable error.

3. The Registrar is satisfied that, on the face of the application, at least one ground of appeal has been made out. The Appeal Panel has conducted a review of the original medical assessment but limited to the ground(s) of appeal on which the appeal is made.

4. The Workers compensation medical dispute assessment guidelines set out the practice and procedure in relation to the medical appeal process under s 328 of the 1998 Act. An Appeal Panel determines its own procedures in accordance with the Workers compensation medical dispute assessment guidelines.

5. The assessment of permanent impairment is conducted in accordance with the *NSW Workers Compensation Guidelines for the Evaluation of Permanent Impairment, 4th* ed 1 April 2016 (SIRA Guidelines) and the *American Medical Association Guides to the Evaluation of Permanent Impairment,* 5th ed (AMA 5).

RELEVANT FACTUAL BACKGROUND

6. It is convenient to extract the history reported by the AMS at Part 4 of the MAC,

> "Brief history of the incident/onset of symptoms and of subsequent related events, including treatment:
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> Mr Crabtree confirmed that on 1 November 2011 he was unloading his truck of fruit and vegetables and in the process of lifting a box of bananas, his right foot slipped pain in the lower back.
>
> He indicated that he continued working for some three weeks as he thought the pain would settle. However, the pain became progressively worse and he said that the boys with whom he worked noticed that he was bent over. One morning he was having a shower and he could not stand up straight and saw in the mirror his back was bent sideways.
>
> He subsequently attended his doctor, Dr Le, and he was referred to Dr van Gelder, Spinal Surgeon.
>
> In April 2012, Dr van Gelder performed an L4/5 discectomy on the lumbar spine. Mr Crabtree said that the operation made no difference and four weeks later, a revision discectomy was performed.
>
> Mr Crabtree indicated that his pains settled and he returned to work full-time.
>
> However, on about 8 August 2013 he was greeted with a bear hug by one of his workmates. This bear hug aggravated his back condition and he was required to undergo a third microdiscectomy in April 2015. Mr Crabtree indicated that the surgery was delayed because he sustained a myocardial infarct in the interim and required insertion of a stent.
>
> Following the third operation, his pain did not improve and he was referred to a pain management clinic to Dr Lam, and a spinal cord stimulator was suggested.
>
> Initially, there were some problems with the spinal cord stimulator but subsequently he continues to have the spinal cord stimulator in situ, indicating the battery in the left iliac fossa of the abdomen and the incision over the thoracic spine leaving a significant scar, as well as the scars from the three operations on the lumbar spine.
>
> Mr Crabtree indicated that with all the painkillers he was taking over the years, he has developed reflux and also constipation. The reflux is a burning feeling which extends from the upper stomach to the throat and he has to limit his diet, particularly avoiding Chinese food and pizzas.
>
> He indicated that he was referred for a gastroscopy and attended for the gastroscopy but when the pre-examination ECG was performed, the surgeon declined to go ahead with the gastroscopy procedure.
>
> He indicated that he has had a colonoscopy, at which polyps were found.
>
> In relation to his constipation, he indicated that he has a bowel motion about every four or five days, with the consistency being sausage-like.
>
> He has been able to maintain his weight."

PRELIMINARY REVIEW

7. The Appeal Panel conducted a preliminary review of the original medical assessment in the absence of the parties and in accordance with the WorkCover Medical Assessment Guidelines.

8. As a result of that preliminary review, the Appeal Panel determined that it was not necessary for the worker to undergo a further medical examination for the reasons given below.

EVIDENCE

Documentary evidence

9. The Appeal Panel has before it all the documents that were sent to the AMS for the original medical assessment and has taken them into account in making this determination.

Medical Assessment Certificate

10. The parts of the medical certificate given by the AMS are set out, where relevant, in the body of this decision.

SUBMISSIONS

11. Both parties made written submissions. They are not repeated in full but have been considered by the Appeal Panel. In summary the parties submit,

Appellant

12. The AMS has erred in failing to follow her own findings on examination and paragraph 16.9 of the SIRA Guidelines which require symptoms and signs of digestive tract disorder. The AMS reports, “no systemic signs of digestive tract disorder” yet assesses 4% whole person impairment (WPI).

13. The AMS has failed to provide adequate reasons as to why her findings on examination and the worker’s history were sufficient to satisfy the requirements of the SIRA Guidelines at paragraph 16.9.

14. The Panel should revoke the MAC and apply 0% WPI for the digestive system.

Respondent

15. The AMS was correct in the assessment of 4% WPI and gave adequate reasons. The requirements of paragraph 16.9 were satisfied by the symptoms and the tenderness found by the AMS which is a sign of upper digestive tract disease.

16. The MAC should be confirmed.

FINDINGS AND REASONS

17. The procedures on appeal are contained in s 328 of the 1998 Act. The appeal is to be by way of review of the original medical assessment, but the review is limited to the grounds of appeal on which the appeal is made.

18. In *Campbelltown City Council v Vegan* [2006] NSWCA 284 the Court of Appeal held that the Appeal Panel is obliged to give reasons. Where there are disputes of fact it may be necessary to refer to evidence or other material on which findings are based, but the extent to which this is necessary will vary from case to case. Where more than one conclusion is open, it will be necessary to explain why one conclusion is preferred. On the other hand, the reasons need not be extensive or provide a detailed explanation of the criteria applied by the medical professionals in reaching a professional judgement.

Ground of appeal – alleged failure of AMS to satisfy paragraph 16.9 of the SIRA Guidelines

19. Paragraph 16.9 of the SIRA Guidelines provides,

"Effects of analgesics on the digestive tract:

- AMA5 Table 6-3 (p 121) Class 1 is to be amended to read 'there are symptoms and signs of digestive tract disease'.

- Nonsteroidal anti-inflammatory agents, including Aspirin, taken for prolonged periods can cause symptoms in the upper digestive tract. In the absence of clinical signs or other objective evidence of upper digestive tract disease, anatomic loss or alteration a 0% WPI is to be assessed."

20. The appellant submits that the finding of the AMS contradict her recorded finding that "There were no systemic signs of digestive tract disorder."

21. The Panel notes that the full paragraph at the end of Part 5 of the MAC reads,

> "On examination of the abdomen, there was reported tenderness over the upper abdomen centrally. There were no masses, including no hepatosplenomegaly. The bowel sounds were normal. There were no systemic signs of digestive tract disorder."

22. At Part 10.b. the AMS explains,

> "In relation to the upper digestive tract, under paragraph 16.9, page 78 of the WorkCover Guides Effects of analgesics on the digestive tract, there is a 4% Whole Person Impairment based on his history given and the localisation of his tenderness in the abdomen. I appreciate that he has not had a gastroscopy performed but in the circumstances of having had a myocardial infarct, I consider that the surgeon on viewing the ECG reasonably declined to do a gastroscopy on medical grounds.
>
> In relation to the constipation, there is a 0% Whole Person Impairment under the Guidelines of paragraph 16.9, page 78."

23. It is unclear what the AMS means by "no systemic signs of digestive tract disorder" at Part 5. However, it is readily apparent from the explanation at Part 10.b. that the AMS did not mean by this statement that in terms of paragraph 16.9 there were no "clinical signs or other objective evidence of upper digestive tract disease, anatomic loss or alteration".

24. While noting there has been no gastroscopy because of unrelated heart concerns, the AMS found the localisation of the tenderness in the abdomen a sign of such disease and, with the history of symptoms, this was sufficient for her to conclude that there is "upper digestive tract disease, anatomic loss or alteration" requiring an impairment rating. She says at Part 10.b., "there is a 4% Whole Person Impairment based on his history given and the localisation of his tenderness in the abdomen." This is within the Class 1 range of 0-9% WPI and the rating was open to the AMS.

25. Contrary to the submission of the appellant, the conclusion does not "override" the SIRA Guidelines but meets them. The findings on examination together with the history of symptoms are sufficient to satisfy the criteria of paragraph 16.9, and the reasons given are adequate. The explanation at Part 10.b. leaves no room for doubt as to the conclusion of the AMS based on the examination findings and that conclusion was open to the AMS.

26. The Panel notes the importance of the exercise of clinical judgement by the AMS in the process of assessment. As the Supreme Court noted in *Glenn William Parker v Select Civil Pty Limited* [2018] NSWSC 140 (*Parker*),

> "In *Ferguson v State of New South Wales* [2017] NSWSC 887 at [23], Campbell J cited with approval *NSW Police Force v Daniel Wark* [2012] NSWWCCMA 36 ('*Wark*'), where it is stated at [33]:
>
> > '…the pre-eminence of the clinical observations cannot be understated. The judgment as to the significance or otherwise of the matters raised in the consultation is very much a matter for assessment by the clinician with the responsibility of conducting his/her enquiries with the applicant face to face. …'"

27. The appellant submits that the AMS has not given sufficient weight to the stimulator battery placement as a possible source of tenderness, but the AMS discussed the stimulator and its battery location and related scarring, but nevertheless identified the central tenderness as a relevant sign relating to the digestive tract. No further explanation is required. There is a presumption of regularity for assessments by an AMS which is not rebutted by the evidence.[1]

28. The appellant submits that the AMS has not referred to the report of Dr Berry or one of the reports of Dr Powell. The Panel notes that it is not required of the AMS to refer specifically to each medical report relied upon. An AMS is required to exercise their own clinical judgement, and a difference of opinion is not a ground of appeal. In *Mahenthirarasa v State Rail Authority of New South Wales & Ors* [2007] NSWSC 22 Malpass AJ considered the Second Reading speech referring to s 327 of the 1998 Act, and made the comment that, "A demonstrable error would essentially be an error for which there is no information or material to support the finding made – rather than a difference of opinion."[2]

29. The appellant also raises an issue related to the assessment of the lumbar spine which is not subject to appeal, but the appellant does not explain how the point raised resulted in error in the assessment of the digestive tract, and the Panel leaves it to one side.

Findings

30. The grounds of appeal are not made out. The Panel discerns no demonstrable error on the face of the Certificate. The assessment was not based on incorrect criteria.

31. For these reasons, the Appeal Panel has determined that the MAC issued on 12 March 2020 is confirmed.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE RECORD OF THE REASONS FOR DECISION OF THE APPEAL PANEL CONSTITUTED PURSUANT TO SECTION 328 OF THE *WORKPLACE INJURY MANAGEMENT AND WORKERS COMPENSATION ACT 1998*.

H Mistry

Heena Mistry
Dispute Services Officer
As delegate of the Registrar

[1] *Vegan*; *Bjkov v ICM Property Services Pty Limited* [2009] NSWCA 175; and *Jones v The Registrar* WCC [2010] NSWSC 481

[2] Also see *Ferguson v State of New South Wales* [2017] NSWSC 887 [24]